Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonably Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996	GN Docket 04-54

COMMENTS OF THE UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AMERICAN PUBLIC WORKS ASSOCIATION, TEXAS COALITION OF CITIES FOR UTILITY ISSUES, MONTGOMERY COUNTY, MARYLAND, AND THE MOUNT HOOD CABLE REGULATORY COMMISSION

Nicholas P. Miller
Gerard Lavery Lederer
Frederick E. Ellrod III
MILLER & VAN EATON P.L.L.C.
Suite 1000
1155 Connecticut Avenue N.W.
Washington, D.C. 20036-4306
Telephone: (202) 785-0600
Fax: (202) 785-1234

Attorneys for United States Conference of Mayors, National Association of Counties, American Public Works Association, Texas Coalition of Cities for Utility Issues, Montgomery County, Maryland, and the Mount Hood Cable Regulatory Commission.

May 10, 2004

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I. INTRODUCTION.

The United States Conference of Mayors, National Association of Counties, American Public Works Association, the Texas Coalition of Cities for Utility Issues, Montgomery County, Maryland, and the Mount Hood Cable Regulatory Commission (collectively "Local Government") jointly file these comments to:

- Answer the questions regarding local right-of-way management posed by the Commission in the NOI;[1]
- Reaffirm for the Commission local governments' commitment to enhancing the deployment of advanced services to all our constituents;
- Remind the Commission of its limited jurisdiction under 47 U.S.C. § 253(c) and (d);
- Share with the Commission a recently released NTIA right-of-way study[2] which shows that many of the right-of-way practices employed by local governments parallel those employed by the federal right-of-way managers at the direction of Congress; and
- Restate[3] its request that the Commission clarify that local governments do not stand in the way of competition and deployment of broadband facilities or the advanced services they make available.[4]

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[1] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonably Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, GN Docket No. 04-54, Fourth Notice of Inquiry, FCC 04-55 (rel. March 17, 2004) ("Notice").

[2] NTIA, *Improving Rights-of-Way Management Across Federal Lands: A Roadmap for Greater Broadband Deployment* (April, 2004) ("*Roadmap*") *available at* www.ntia.doc.gov/reports/fedrow/files/cover.htm.

[3] *See* Reply Comments of TCCFUI and NATOA and National League of Cities in the 3rd 706 NOI filed October 9, 2001

A. National Association of Counties

The National Association of Counties (NACo) was created in 1935 when county officials wanted to have a strong voice in the nation's capital. More than six decades later, NACo continues to ensure that the nation's 3066 counties are heard and understood in the White House, the halls of Congress and within the independent agencies such as the Federal Communications Commission. NACo's membership totals more than 2,000 counties, representing over 80 percent of the nation's population.

B. United States Conference of Mayors

The U.S. Conference of Mayors is the official nonpartisan organization of the nation's 1183 U.S. cities with populations of 30,000 or more. Its chief elected official, the mayor, represents each city in the Conference. The primary roles of the Conference of Mayors are to: promote the development of effective national urban/suburban policy; strengthen federal-city relationships; ensure that federal policy meets urban needs; provide mayors with leadership and management tools; and create a forum in which mayors can share ideas and information.

C. American Public Works Association

The American Public Works Association (APWA) is an international educational and professional association of public agencies, private sector companies, and individuals dedicated to providing high quality public works services. APWA members design, build, operate and maintain our nation's public infrastructure, including the public rights-of-way. With origins in the late 1800's, and officially chartered in 1937, APWA is the largest and oldest organization of

[4] The Commission's *Trends in Telephone Service* Report released on May 6, 2006 is further evidence of the accelerated rate at which advanced services are being made available. According to the Commission's press release, "Advanced services lines (exceeding 200 kbps in both directions) connecting homes and businesses to the Internet increased by 32% during the first half of 2003, from 12 4 million lines in service as of December 31, 2002 to 16.3 million as of June 30, 2003." FCC Press Release, *available at* http //hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-246951A1.doc.

its kind in the world, with headquarters in Kansas City, Missouri, an office in Washington, D.C., and 67 chapters and 83 branches in North America. APWA provides a forum in which public works professionals can exchange ideas, improve professional competency, increase the performance of their agencies and companies, and bring important public works-related topics to public attention in local, state and federal arenas.

D. Texas Coalition of Cities for Utility Issues

The Texas Coalition of Cities for Utility Issues ("TCCFUI") is a coalition of more than 110 Texas cities dedicated to protecting and supporting the interests of the citizens and cities of Texas. TCCFUI monitors the activities of the Texas Legislature, Public Utility Commission, Rail Road Commission and the Federal Communications Commission. TCCFUI also provides franchising expertise and model franchise documents to member cities, and ensures that the citizens of Texas continue to enjoy quality utility and cable service.[5]

E. Montgomery County, Maryland

Established in 1776, Montgomery County, Maryland, is an urban county with 900,000 residents, 230,000 cable customers, 14 telecom companies, and numerous wireless providers. Montgomery County is Maryland's most populous jurisdiction and has one of the most robust broadband markets in the nation. The County is located adjacent to the nation's capital,

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[5] TCCFUI MEMBER CITIES include, Abernathy, Addison, Alamo, Allen, Andrews, Arlington, Balcones Heights, Belton, Benbrook, Big Spring, Bowie, Breckenridge, Brenham, Brookside Village, Brownfield, Brownwood, Buffalo, Canyon, Carrollton, Cedar Hill, Center, Cleburne, College Station, Conroe, Corpus Christi, Cottonwood Shores, Crockett, Dallas, Denison, Denton, Dickinson, El Lago, Electra, Euless, Fairview, Flower Mound, Fort Worth, Fredericksburg, Friendswood, Frisco, Grand Prairie, Grapevine, Greenville, Gregory, Henrietta, Huntsville, Irving, Jacinto City, Jamaica Beach, Kilgore, La Grange, La Joya, Lampasas, Lancaster, Laredo, League City, Leon Valley, Levelland, Lewisville, Longview, Los Fresnos, Mansfield, McAllen, Mexia, Midlothian, Missouri City, Newark, Nolanville, North Richland Hills, Oak Point, Palacios, Pampa, Paris, Pearsall, Plainview, Plano, Port Neches, Ralls, Refugio, Reno, Richardson, River Oaks, Rosenberg, San Marcos, San Saba, Selma, Seminole, Seymour, Smithville, Snyder, South Padre Island, Spearman, Stephenville, Sugar Land, Sunset Valley, Taylor Lake Village, Terrell, Thompsons, Timpson, Trophy Club, Tyler, University Park, Vernon, Victoria, Waxahachie, Webster, West University Place, and Westlake.

Washington, D.C., and includes 497 square miles of land area. Montgomery County has been very active in the right-of-way issue through its elected officials' participation in the issue at the Federal Communications Commission, before the Congress and within the national organizations of local elected officials.

F. Mt. Hood Cable Regulatory Commission

The Mt. Hood Cable Regulatory Commission ("MHCRC") advocates for, and protects the public interest in, the regulation and development of cable communications systems in Multnomah County and the Cities of Fairview, Gresham, Portland, Troutdale and Wood Village, Oregon. The MHCRC further monitors and helps resolve cable subscribers' concerns in these jurisdictions; and participates in the development and planning of future telecommunications technologies that make use of the public rights-of-way. This multi-jurisdictional commission consists of eight appointees: three from Portland, and one each from Multnomah County, Gresham, Troutdale, Fairview and Wood Village.

II. COMMISSION MUST NOT CONFUSE ITS SECTION 706 REPORTING MANDATE WITH A CONGRESSIONAL DELEGATION OF AUTHORITY OVER RIGHTS-OF-WAY.

The U.S. Constitution protects local governments' property rights in the public rights-of-way. The Constitution also protects the federal form of government, reserving to states and local governments all powers not expressly delegated to the federal government, including all authority to manage use and disruption of local public rights-of-way. National broadband or advanced services policy may not preempt the U.S. Constitution and must recognize the rights of local governments under the Telecommunications Act of 1996 ("1996 Act").

The legislative history of the 1996 Act is clear that Congress was well aware of local governments' need to manage access to their rights-of-way. Congress also recognized that such

management responsibilities were to become ever more critical as multiple providers competed for space in the public rights-of-way. Congress understood that as a practical matter, no other government entity could supplant local authorities in the essential task of managing access to the public rights-of-way. Congress also understood that the public rights-of-way are valuable property held in trust for local citizens by local governments, and that citizens-property owners are entitled to receive "fair and reasonable compensation" for the use of the rights-of-way.

Local Government would therefore remind the Commission that the Congress, by enacting 47 U.S.C. § 253(d), clarified that 253(c) issues are the exclusive domain of the courts. Local government would also remind the Commission that any claims of preemption by implication are precluded by Section 601(c) of the Telecommunications Act of 1996, which states in subpart (c):

> NO IMPLIED EFFECT. –This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

The Commission, therefore, may not create new rules governing local right-of-way management, limit compensation, nor create adjudicatory procedures for local public right-of-way management and compensation. The courts have also rejected industry attempts to eviscerate the protections of § 253(c).[6]

A. Preemption of State and Local Regulations Is Not Permissible Unless Such Regulations Prohibit or Have the Effect of Prohibiting the Provision of Telecommunications Service.

Under § 253(a), state and local right-of-way management regulations may not be preempted unless the agency determines that the state and local requirements "prohibit or have the effect of prohibiting the ability of any entity to provide" telecommunications service. The

FCC has also recognized that an industry complainant must first establish that there is a prohibition before there can be a violation of § 253:

> [I]t is up to those seeking preemption to demonstrate to the Commission that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers' ability to provide an interstate or intrastate telecommunications service under section 253(a). Parties seeking preemption of a local legal requirement . . . must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c).[7]

More recently, the Eleventh Circuit interpreted § 253 and applied the same construction:

> [I]t is clear that (b) and (c) are exceptions to (a), rather than separate limitations on state and local authority in addition to those in (a). Consistent with this interpretation, if a party seeking preemption fails to make the threshold showing that a state or local statute or ordinance violates (a) because it "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," the FCC has found it unnecessary to consider whether the statute or ordinance is "saved" by the exceptions in (b) or (c).[8]

B. Section 253(d) Precludes Federal Agencies From Addressing Issues Regarding Local Right-of-way Compensation Or Management.

Should credible evidence be presented to demonstrate that a state or local regulation has the effect of prohibiting the provision of telecommunications service, § 253(d) bars the FCC from considering whether a state or local right-of-way compensation or management technique is at issue. Congress reserved these issues exclusively to the courts. Subsection (d) gives the Commission authority to resolve only subsection (a) and (b) disputes, and *withholds* from the Commission authority over subsection (c) disputes.

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[6] *See, e g , TCG Detroit v City of Dearborn*, 206 F.3d 618 (6th Cir 2000); *BellSouth Telecommunications, Inc , v Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001); *TCG New York, Inc v City of White Plains*, 125 F. Supp 2d 81 (S.D.N.Y. 2000).

[7] *In the Matter of TCI Cablevision of Oakland County*, 12 FCC Rcd. 21,396 at ¶ 101, *aff'd* 13 FCC Rcd. 16,400 (1998) (emphasis added).

[8] *Town of Palm Beach,* 252 F.3d at 1188 (emphasis added) *citing In re Missouri Municipal League*, 16 FCC Rcd. 1157, 2001 WL 28068 (2001); *In re Minnesota*, 14 FCC Rcd. 21,697, 21,730 (1999), *In re American Communications Servs , Inc.*, 14 FCC Rcd. 21,579, 21,587-88 (1999); *In re Cal Payphone Ass'n*, 12 FCC Rcd. 14,191, 14,203 (1997).

The legislative history of Section 253 reveals that Subsection 253(d), the preemption provision, was added in Conference, based on Section 254 of the Senate Bill.[9] In the Senate, § 254(d), as originally proposed and numbered, contained a sweeping preemption provision that did not exclude subsection (c) from its coverage. After a proposed amendment to remove the preemption provision in subsection (d) entirely, and after substantial debate on the Senate floor, a compromise amendment, offered by Senator Gorton (R-WA), was adopted to preserve state and local authority over management of and compensation for the public rights-of-way. The Gorton Amendment, adopted by unanimous voice vote, revised subsection (d) to clarify that subsection (c) (right-of-way management and compensation issues) would not be subject to FCC preemption authority under subsection (d).

Senator Gorton stated:

> There is *no* preemption . . . for subsection (c), which is entitled, "Local Government Authority," and which preserves to local governments control over their public right of way. It accepts the proposition from [Senators Feinstein and Kempthorne] that these local powers should be retained locally, that any challenge to them take place in the Federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions.[10]

The intent of Congress to reject any implied FCC preemptive authority over local and state governments is also explicit:

> The conference agreement adopts the House provision [under Section 601] stating that the bill does not have any effect on any other Federal, State, or local law unless the bill expressly so provides. This provision prevents affected parties from asserting that the bill impliedly preempts other laws.[11]

Section 601(c)(1) states:

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[9] The House provision did not contain any preemption provision at all. H.R. Conf. Rep. No 458, 104th Cong., 2d Sess. 126-27 (1996). Thus, the history of the provision must be found in the Senate bill, S. 652, rather than in the House version

[10] 141 Cong. Rec. S8213 (daily ed. July 13, 1995) (remarks of Sen. Gorton) (emphasis added)

[11] H.R. Conf Rep. No 458, 104th Cong., 2d. Sess., 201 (1996).

NO IMPLIED EFFECT. –This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.[12]

C. Congress Preserved Local Authority to Impose Reasonable Compensation and Management Requirements.

Section 253(c) specifically preserves local authority to recover reasonable right-of-way compensation and conduct right-of-way management. Both the language of 253(c) and the intent of Congress are explicit and unambiguous. The Senate bill that eventually became the 1996 Act was introduced without any safe harbor for local governments. The Senate Commerce Committee added subsection (c) substantially in its present form to the Senate bill as originally introduced. The Committee intended to provide a safe harbor for local governments.

The House took similar action to preserve local authority over public rights-of-way. The House bill explicitly preempted local right-of-way compensation. While it included a safe harbor provision for state consumer regulation, analogous to the Senate's version,[13] it also contained a preemption requiring "parity" of franchise fees and other local charges between incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs). This parity provision was cast in the form of a prohibition ("no local governments may impose or collect..."). These two provisions were generally referred to as the "MFS amendment," because that company had successfully sought inclusion of similar language in H.R. 4103, a predecessor bill in the 103d Congress.

In the House hearings, local governments witnesses testified in opposition to the MFS amendment. Negotiations between Representatives favoring the local governments' position and Representatives favoring the MFS position failed to resolve how the House bill should treat

[12] Telecommunications Act of 1996, 47 U S.C. § 601(c)(1).

[13] H.R Conf. Rep. No. 458, 104th Cong , 2d Sess., 201 (1996)

right-of-way issues.[14] The debate then moved to the floor of the House. After debate, the House adopted the Barton-Stupak[15] amendment by the overwhelming vote of 338-86.[16] The Barton-Stupak amendment struck the entire Committee proposal to preempt local governments, including the MFS amendment, and substituted new language essentially the same as that added by the Senate Committee, with three exceptions not directly material here. Speaking in support of the Barton-Stupak amendment, Representative Barton stated:

> [The amendment] explicitly guarantees that cities and local governments have the right not only to control access within their city limits, but also to set the compensation level for the use of that right-of- way.... The Chairman's amendment has tried to address this problem. It goes part of the way, but not the entire way. The Federal Government has absolutely no business telling State and local governments how to price access to their right-of-way.[17]

Despite the overwhelming House vote in favor of the Barton-Stupak amendment and rejecting Mr. Schaefer's position, as well as the unanimous adoption of the Gorton amendment on the Senate floor, the debate over local right-of-way management and compensation language continued into the Conference Committee. Mr. Schafer was a member of the Conference

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[14] Representatives Schaefer (R-Colo.), the leading proponent of the MFS amendment, met with Representative Barton (R-Texas), and Representative Stupak (D. Mich). In these negotiations the parties failed to reach agreement on whether to replace bill language that, in the words of the Committee's Report on H.R. 1555, H. Rpt. 104-204, would prohibit activity that "discriminates among providers of telecommunications services (including the LEC)." *Id* at 75.

[15] The Commission might also note that prior to its October 10, 2002, Rights-of-Way Summit, Representative Stupak sent the Commission a letter to remind it of the limited grant of authority provided the Commission under Section 253. Rep Stupak wrote: "[A]s you move forward on this matter, I would hope that you avail yourselves of the very rich legislative history on the development and final passage of Section 253 of the Communications Act, particularly Section 253(c). As the co-author, with Rep. Joe Barton of Texas, of the amendment that carried the day denying the FCC any authority over local governments management or fees charged for access to local rights-of-way, I write to reaffirm what the Act, the legislative history and Congressional Record all make very clear. The Federal Communications Commission was not empowered to determine the compliance of state or local governments with Section 253(c). That jurisdiction was reserved exclusively for the Federal Courts."

[16] 141 Cong. Rec. H8477 (daily ed. Aug. 4, 1995). The Barton-Stupak amendment was adopted despite Representative Schaefer's objection that the amendment "is going to allow the local governments to slow down and even derail the movement to level competition." *Id* at H8460-61. In other words, in enacting the Barton-Stupak amendment, Congress considered specifically whether to allow preemption in light of claims that preserving local governments' rights would slow down competition – which is not the case – and *rejected* preemption even so.

Committee and attempted once again to revisit preemption of local right-of-way authority. The final conference agreement on the bills as adopted by both houses, however, adopted the Senate language of § 253. The final law thus preserves the safe harbor protecting the authority of local governments over right-of-way management and compensation.

Section 253(c) begins "Nothing in this section affects...." Congress chose this language to mirror Section 2(b) of the 1934 Act, 47 U.S.C. § 153(b) ("Nothing in this act shall ... apply ..."). [18] Congress was well aware that the Supreme Court had held that language to be an overarching denial of jurisdiction to the Commission in *Louisiana PSC v FCC*, 476 U.S. 355, 370, 374 (1986) (the language "fences off" this area from FCC jurisdiction). [19]

D. Under Federal Law, Compensation for Use and Occupation of Public Rights-of-Way Is Not Limited to Cost.

Nothing in Section 253(c) suggests that public compensation for private use of public rights-of-way is limited to cost. Congress spoke of "compensation ... for use" rather than reimbursement of costs. The debate on the Barton-Stupak Amendment on the House floor explicitly ratified franchise fees measured by the traditional percentage of gross receipts – analogous to the percentage franchise fee for cable television operators, embodied in Section 622 (Franchise Fees) of the Cable Communications Policy Act of 1984. [20]

Had Congress intended to limit local governments to recovery of its costs, it would have used language to that effect. Congress did not. Instead, Congress employed the term "compensation," which as one federal court recently stated, "has long been understood to allow

[17] *Id* at H8460.

[18] This is the same section 2(b) that the drafters of Section 243(e) of H.R. 1555 (part of the "MFS amendment") had thought necessary to expressly override in their 1995 attempt to give the Commission jurisdiction over such matters.

[19] *See also Iowa Utilities Board v FCC*, 120 F.3d 753, 800 (8th Cir. 1997), *aff'd in part*, 525 U.S. 366 (1999) ("a fence that is hog tight, horse high, and bull strong").

[20] 47 U S C § 542(b). 141 Cong. Rec H8460-61 (daily ed Aug. 4, 1995).

local governments to charge rental fees for public property appropriated to private commercial uses."[21] The United States Supreme Court also held early on that a franchise fee could properly be based on the value of the franchise and that whether the municipal fee was excessive or not could not be determined from the face of the franchise.[22]

E. A Recent Federal Rights-of-Way Working Group Paper Shows that the Federal Government Seeks to Recover Fair Market Value Rental Fees Over and Above Costs.

The National Telecommunications and Information Administration in April of this year released a report of the Federal Rights-of-Way Working Group entitled *Improving Rights-of-Way Management Across Federal Lands: A Roadmap for Greater Broadband Deployment.* In the study, the managers of the federal government's rights-of-way make clear that it is the policy of the federal government both to collect a fair market value ("FMV") rental fee and to recover any costs the government incurs in making federal rights-of-way available to industry.

The report states:

> "In most cases, federal agencies calculate and recover these (administrative) costs separately from a land use fee, also known as a rental fee, or some other consideration given in exchange for use of the rights-of-way."[23]

The report also clarifies that there are obligations on government officials beyond the deployment of advanced services:

> "As the trustee of public lands, the Federal Government is responsible for preserving, to the extent possible, the natural state of wilderness, coastal, and other protected lands, and for sustaining the productivity of the lands' renewable and other resources."[24]

In explaining the federal outlook on right-of-way access, the report states:

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[21] *TCG v White Plains,* 125 F. Supp. 2d 81, 96 (S.D N.Y. 2000)

[22] *City of St Louis v Western Union Tel Co*, 148 U.S. 92, 104-105 (1893).

[23] *Roadmap* at 27.

[24] *Id* at p.35

In addition to cost recovery fees, rights-of-way applicants also encounter other land use fees, such as rental fees. Specifically, a variety of statutes and regulations direct federal agencies to assess and collect rent, or obtain consideration for, the use of federal lands, including for rights-of-way.[25]

The *Roadmap* report also cites a number of federal statutes requiring "rental payments" on a FMV basis. These include:

- 31 U.S.C. § 9701 (Fees and charges for Government services and things of value)[26];
- 40 U.S.C. § 1314 (Public Property code that clarifies that rights-of-way are special property governed by their own rules. *See* 43 U.S.C. § 1761 et. seq.);
- 43 U.S.C. § 1764 (Land Policy and Management Requirements)[27]and
- 43 U.S.C. § 1765 (Land Policy and Management Terms).[28]

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[25] *Id.* at p. 30

[26] 31 U.S.C. § 9701 provides:
Fees and charges for Government services and things of value
(a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation)to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.
(b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be--
(1) fair; and
(2) based on--
(A) the costs to the Government;
(B) the value of the service or thing to the recipient;
(C) public policy or interest served; and
(D) other relevant facts.
(c) This section does not affect a law of the United States--
(1) prohibiting the determination and collection of charges and the disposition of those charges; and
(2) prescribing bases for determining charges, but a charge may be redetermined under this section consistent with the prescribed bases.

[27] Among the requirements a federal agency may demand under this statute are: Submission of Plans, compliance with all federal imposed regulatory requirements, payment of rent over and above costs; liability insurance or coverage and bonding or security requirements.

[28] This statute establishes what a party should pay for a federal right of way. It states that "Each right-of-way shall contain .. i) protect Federal property and economic interests, ii) manage efficiently the lands which are subject to the right-of- way or adjacent thereto and protect the other lawful users of the lands adjacent to or traversed by such right-of-way; (iii) protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto."

The *Roadmap* report also notes: "The House of Representatives has passed legislation during each of the last two sessions of Congress to require that any revision of the rental schedule be similar to the current schedule, in which the annual rates are based on a percentage of the estimated fee simple value of the land being occupied."[29]

Lastly, the *Roadmap* Task Force recommends that all relevant federal land management agencies commence rulemakings to develop cost-recovery processes and fair market value-based rental payments by December 2004.[30]

In light of the *Roadmap* report and recommendations, Local Government fails to see how industry advocates or the Commission could conclude that municipal requirements to recover costs and a fair market value rent violate Section 253(a) or (c). The federal government itself has taken a similar approach, as documented in the NTIA study.

F. Compensation For Use of the Public Rights-of-Way May Be In the Form of Gross Revenues.

Courts have concluded that "calculating the impact or costs of telecommunications providers on the public rights-of-way would not be a simple undertaking."[31] They have understood, as have local communities, that:

> A number of intangible factors would need to be considered, including the shortened life of pavement, added police costs to deal with traffic disruptions, interference with the City's other systems, impact on traffic, and offsetting benefits to the City from the availability of multiple telecommunications providers.[32]

Local governments, therefore, have been forced to develop fair and reasonable methods of approximating a provider's use of public rights-of-way. One such method has been the use of

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[29] *Roadmap* at 31, n. 31

[30] *Id* at 29, 34-35.

[31] *White Plains*, 125 F. Supp at 96, n 11.

[32] *Id.*

gross revenues. The telecommunications provider's gross revenues provide a measure of the carrier's use that is roughly proportional to the intensity of the provider's use of the public rights-of-way. Use is not limited to permanent physical occupancy. Transiting public rights-of-way is a use of that roadway. Consider that the telecommunications provider using facilities in rights-of-way is in the business of transporting bits of information over lines occupying the streets. As a first approximation, the provider's charge to customers is proportional to the amount of information transported, *i.e.*, the number of bits. The amount of the carrier's transport is reflected in its revenues. Therefore, to measure use of the rights-of-way by information transported for which the end-user pays is comfortably within the legislative discretion of local governments.

Given the difficulty of determining the costs to be associated with a particular company's use of the rights-of-way, a gross revenues fee offers the simplest and fairest way of setting compensation. Several courts have recognized these difficulties, and have upheld gross revenue-based compensation.[33]

G. The Commission Lacks Capacity to Arbitrate the Right-of-Way Debate.

The Commission lacks both the legal authority and the professional staff to assume the task of arbitrating tens of thousands of right-of-way access requests.[34] Section 253(c) reflects

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[33] *See, e.g., TCG Detroit v City of Dearborn*, 206 F.3d 618 (6th Cir. 2000); *TCG v. White Plains,* 125 F. Supp. 2d 81 (S.D N Y. 2000); *Omnipoint Comm'ns, Inc v Port Authority of New York and New Jersey*, 1999 WL 494120 (S.D.N Y. 1999); *BellSouth Telecommunications v City of Orangeburg,* 522 S.E.2d 804, 808 (S.C. 1999) (finding "franchise fee equal to a percentage of the revenue generated is not inherently unfair or unreasonable...").

[34] By way of example, comments in another proceeding note that the *average* processing time for cable rate regulation matters at the Commission was approximately five *years*. *See* Average Time Taken to Resolve Cable Regulation Proceedings in 2000, Exhibit I of the Further Comments of the Real Access Alliance, *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets,* CC Docket No. 96-98, *Wireless Communications Association International, Inc Petition for Rulemaking to Amend Section 1 4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services,* CC Docket No 88-57, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Review of Section 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network,* WT Docket No. 99-217 (filed Jan. 22, 2001). And

Congress's recognition that local government is the only level of government capable of managing right-of-way access. The authority to manage right-of-way access is traditionally and necessarily local. There is no one set of optimal construction, maintenance, make-ready, undergrounding, space allocation, restoration or insurance requirements fitting all communities. Indeed, if industry commenters had been successful in past requests which sought to burden the Commission with the job of policing local rights-of-way nationwide, the result would undoubtedly be *slower* resolution of these detailed issues than now occurs at the local level.

III. IT IS WELL PAST TIME THAT THE COMMISSION DEMANDED PROOF OF ALLEGATIONS AND REJECTED INDUSTRY MYTHS.

Right-of-way management by local governments is necessary to balance the competing demands placed upon local rights-of-way. Complaints that paying a fair price for the use of municipal property is a barrier to entry are no more than an attempt to seize a local community's property for a single entity's benefit. By seeking to disguise property rights as regulatory constraints, the industry has pursued a strategy of employing federal coercive power to interfere with a market transaction. Right-of-way compensation is paid by a user who *receives a special benefit in return* for that payment, and there is no basis for requiring local governments to subsidize competitors by turning over a valuable asset without charging an economically efficient price.[35]

In previous 706 dockets,[36] industry commenters sought by sheer repetition to perpetuate the undocumented myth that local governments stand in the way of progress. The truth is that

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this involved applying a set of uniform FCC regulations only slightly affected by local conditions – unlike local right-of-way matters.

[35] *See generally* Frederick E. Ellrod III and Nicholas P Miller, *Property Rights, Federalism, and the Public Rights-of-Way*, 26 Seattle Univ L. Rev. 475 (2003).

[36] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the*

local communities are eager for competition and for the provision of advanced services to their citizens. There has been no evidence to suggest that local governments' current right-of-way management or compensation policies have impeded the entry of competitive providers into the market.

Local communities are eager for competition and for the provision of advanced services to their citizens. They have taken a wide variety of steps to encourage the development of competitive networks. For example, a recent report from the Texas Public Utilities Commission describes numerous initiatives and local community success stories in developing advanced services. Local communities have also taken the initiative to encourage broadband services to schools and develop improved uses of advanced technologies by government itself – for example, through the cable franchising process. In past Section 706 proceedings industry commenters, by repeating their familiar refrain of vague allegations about local government delays, have sought to obscure the fact that local governments are *assisting* in achieving the same goals of network development that the Commission wishes to promote.

There is no evidence to suggest that local governments' current right-of-way management or compensation policies have impeded the entry of competitive providers into the market. Telecommunications providers are pursuing entry strategies based on market factors, not local right-of-way policies.[37] These market factors include the number and density of potential customers and revenues, and lowest costs of construction due to highest customer density. The

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Telecommunications Act of 1996, CC Docket No 98-146, Report, 14 FCC Rcd. 2398, 2402, 2446-48 (1999) (First Report); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996* CC Docket No. 98-146, Second Report, 15 FCC Rcd. 20913, 20991 (Second Report); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996* CC Docket No. 98-146, Report, 17 FCC Rcd. 2844 (2002) (Third Report).

[37] *See* Pub. Util. Comm'n of Tex., *Report to the 77th Texas Legislature: Availability of Advanced Services in Rural and High Cost Areas* (2001).

fact that competitive networks are being built – and being built in communities where local governments do reasonably regulate their public rights-of-way and charge market-driven prices for use of their rights-of-way – shows that no "prohibition" of entry is occurring.

It is of course true that CLEC network expansion has slowed abruptly.[38] But, once again, this has nothing to do with local communities' right-of-way policies. Rather, it has to do with the carriers' access to capital and with business conditions generally.[39] It is inappropriate for the industry commenters to seek to blame local communities for independent market conditions and the industry's own business decisions.

A. Appropriate Right-of-way Management is Not a Barrier to Entry.

The goal of the Telecommunications Act of 1996 was increased facilities-based competition. The immediate, direct and inevitable result of this federal policy is to require more active right-of-way management, since more and more providers are using the streets. Local communities attempt to develop effective and well-balanced mechanisms for accommodating multiple right-of-way users. These efforts parallel and support the federal efforts to encourage facilities-based competition.

In carrying out this task of furthering competition, local governments frequently work with telecommunications providers and other users to resolve problems and make right-of-way

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[38] *See, e g*, Richard Waters, *CLECs Prepare for a Rough Ride in the Financial Markets: Competitive Local Exchange Carriers are Scrambling To Cut Spending as Investors and Lenders Become Skittish*, Financial Times (London), at 38 ("Most are now scrambling to cut spending and bring forward the point at which they can report a profit"), Lee Bergquist, *New Cable Company Pulling Plug, Digital Access Cites Inability to Raise Capital*, Milwaukee Journal Sentinel, Mar. 3, 2001, at 1D ("when financing is drying up for many companies that want to build cable systems in markets where there is existing cable operator."); Mavis Scanlon, *RCN: After the Fall*, Cable World, Jan. 1, 2001 ("The pull back in the capital markets 'definitely' is going to effect every overbuilder").

[39] For example, the City of Arlington, Texas, entered into negotiations with WideOpenWest ("WOW") in October, 2000, to build a broadband network to offer video, voice and high-speed Internet services in the City of Arlington. In May of 2001, WOW requested a brief hold in negotiations while the negotiating team concentrated on other matters. Shortly after announcing its intention to acquire the former Ameritech News Media systems in the Midwest, WOW told the City that its franchise negotiations were on hold indefinitely. This sort of development

work more efficient. On the other hand, at times local governments face situations in which telecommunications providers' refusal to cooperate makes it difficult for the locality to develop effective approaches to conserve right-of-way resources. More directly harmful are those cases where failure to abide by sound standards of right-of-way management results in serious damage.[40] Someone must be responsible for keeping track of facilities in the public rights-of-way (with the ancillary need for maps and placement information) to prevent cutting of lines; for dealing with abandoned plant when carriers go bankrupt; for managing limited space in key locations to accommodate as many users as possible; and so forth.

Right-of-way management by local governments is necessary to balance the competing demands placed upon local rights-of-way. The carriers themselves are obviously in no position to arbitrate the conflicts and difficulties that arise among them. The interests of competing carriers in access to the rights-of-way are not always congruent with each other or with the legitimate interests of local governments and their citizens.

The Federal Rights-of-Way *Roadmap* study is also helpful here, in demonstrating that federal managers believe that right-of-way management is not a barrier to entry. In fact the *Roadmap* Task Force recommends that all relevant federal land management agencies commence rulemakings to develop cost-recovery processes and fair market value based rental payments by December 2004.[41] The *Roadmap* Task Force recommends the following management techniques, for Federal lands, many of which industry representatives have objected to in the past as violating Sections 253(a):

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illustrates the market at work: even when local communities are ready and even eager to accommodate a communications provider, the provider may go elsewhere due to market forces.

[40] *See, e g.*, Competitive Networks Comments, Reply Comments at 20-26. *See also* examples of Texas right-of-way accidents *cited in* Comments of the Texas Coalition of Cities For Utility Issues (TCCFUI), filed today in this proceeding.

[41] *Roadmap* at 29, 34-35.

- Right-of-way applicants must bring to a pre-application meeting a map of where they seek to deploy their equipment. (p.18 n. 51)
- Federal right-of-way managers should request that right-of-way users collocate equipment and do joint deployments. (p. 25)
- Federal right-of-way managers should enforce "Uniform Appraisal Standards for Federal Land Acquisitions" (December 2000) (p.35 n.89).
- Federal right-of-way managers should oversee carriers' activities to ensure proper installation and maintenance of facilities. (pp. 36-40)
- Federal right-of-way managers should require operators to provide compliance reports to ensure compliance with rules. (p. 41)
- Federal right-of-way managers should follow the practice of having applicants file bonds to ensure the federal government does not bear any unforeseen expenses. (pp. 41, 53)

B. Right-of-Way Management Is Necessary to Protect the Public Health and Safety.

A local government's responsibility to protect the public health and safety cannot be understated. Newspapers and nightly news programs are full of examples where the failure of telecommunications providers (or other right-of-way users) to abide by sound standards of right-of-way management has resulted in serious damage due to the use of the same physical space by multiple companies.[42] Rather than reprint an exhaustive list of such incidents,[43] Local Government has collected a series of events demonstrating how deployment of telecommunications infrastructure has impacted every other utility/occupier of the rights-of-way. Such lists demonstrate that local governments' management of the rights-of-way and requirements for mapping, insurance, bonding, and compliance with safety standards and codes are neither punitive nor academic.

A. Water Mains

[42] In some urban areas the degree of crowding already causes significant problems for work in the rights-of-way For example, a sewer repair crew in San Francisco recently reported having to repair a three-by-five sewer pipe from inside the pipe because there was no other room left to work. Joanna Glasner, *High Bandwidth Bureaucracy*, Wired News, Mar. 25, 1999.

[43] For such a list, *see* http://www.underspace com/acfile/index.htm.

- Southfield, MI - 9/22/02 Detroit Water and Sewer Dept. Officials are blaming a faulty underground installation of fiber-optic lines for massive water main break last Sunday that busted sections of Inkster and 12 Mile Roads and caused flood damage to a dozen homes in Southfield's San Marino neighborhood. It will cost millions to repair damaged roadway and pipes under Inkster Road and officials say it will be at least a month before the road is fixed. An instrument used to drill underground paths for fiber optic lines scraped the 60 inch mains that are between 35-37 years old. The fiber optics were installed by a small telecommunications company that provides telephone and Internet services, and were installed shortly before the intersection was rebuilt two years ago. "[T]he tool got too close to the main. You can't blame the age of the mains because they are designed to have a life of about 60 years." The mains are located 20 feet below the road. From the *Southfield Eccentric* 9/22/02 www.observerandeccentric.com.

- Labor Day 2000, contractors installing fiber-optic cable in central Dallas struck a water main. As a result of the damage, water gushed into the streets and poured into a parking garage below a luxury building, practically destroying two full levels of cars. By the time the flooding ended, the damage was well over $4.5 million.

- Irving, TX - July 1999 – Four-foot diameter water pipe damaged when fiber-optic contractor boring under State Highway 114 hit the water line. Damage will be billed to Power Plus Directional Boring, the subcontractor that caused the damage. *Irving News* July 15, 1999.

B. Power Lines

- Seattle, WA - 4/27/99 - Power was knocked out for more than two hours to 2,800 customers when a cable TV worker came in contact with a 26,000-volt electrical line on the roof of a four-story building.

C. Gas Lines

- In Denver, two houses were leveled and another ten damaged in an explosion caused when a construction crew cut an eleven-inch hole in a natural gas line while installing a cable television conduit.

- Mayor Larry Meyer of St. Cloud Minnesota can tell you how sad he was to have to declare Saturday, December 11, 1999 a day of remembrance for citizens of his community killed when a natural gas pipeline was struck by subcontractors digging to install cable lines. Four people were killed, more than a dozen injured in the explosion, with property damage in excess of $1 million.

- In Warrensburg, Mo., near Kansas, City, a subcontractor struck a gas line in July, 2001 sending fumes into a nearby sewer line. The gas spread to several homes, causing an explosion in a clothes dryer and burning a man over 30% of his body.

D. Phone Lines

- South Arlington, TX - July 17, 1999 - 3,600 residents and businesses were left without 911 emergency service after a Southwestern Bell contractor cut a phone line at the intersection of Barton and Matlock roads.

- In Batavia, NY, telephone service for the entire city (including 911 emergency service) was cut for over twenty-four hours when an inexperienced phone crew severed the main telephone cable serving the city. Local governments are especially concerned with the problems of potential accidents and accompanying liability they will face when they want to access a utility line blocked by the many wires laid by telecommunications providers.

E. Steam Lines

- In San Francisco, where there had been over a dozen similar explosions in the preceding twelve months, a company ruptured a steam pipe underneath a downtown office building. If the explosion had occurred while the building had been occupied, hundreds of people would have been scalded.

F. Sewers

- Plano, Texas October 14, 2000 - A fiber-optic contractor drilled into a 33-inch pressurized sewer line resulting in what one public works official called "one of our deepest, darkest nightmares." The city was forced to deal with the aftermath of more than 4 million gallons of raw sewage that seeped into a local waterway.

Local government requirements not only prevent accidents, but also save money for all right-of-way users. For example, common trenching can save money for all concerned, avoiding cases such as that of Sierra Pacific Power Company in Reno, Nevada, which ended up paying $90,000 in additional costs when it dug up a newly resurfaced street for a new installation.[44] In a

[44] *See Nevada Briefs*, Las Vegas Review Journal, Sunday, Aug. 8, 1999, at 4B.

similar case, Constitution Avenue N.W. in Washington, D.C., after being resurfaced in 1998, was reopened by e.spire in early 1999 to install communications lines.[45]

C. Communities Experience Substantial Costs For Right-of-Way Management.

Public rights-of-way involve substantial costs to communities. The most obvious, and smallest, are the costs of administering use – processing applications, reviewing the qualifications of users (and their subcontractors), overseeing installations and ongoing maintenance, and the like. A community also incurs the cumulative cost of telecommunications companies' incursions into the public rights-of-way. Numerous studies have documented that repeated street cuts reduce the useful life of a street, even if the surface is "repaired" by the company making the cut.[46] This cost is massive, and it is increasing. For example, the D.C. government's average of 9,000 street cut applications swelled to 15,000 by 1998.[47] A news item from San Francisco reported: "In the past three months, three different telecommunications companies have torn up exactly the same strip of road in almost the exact same spot. Three more companies are lined up to do the same."[48]

Neither of these categories of costs takes account of the communities' original cost of obtaining the land and constructing and maintaining the physical improvements which public

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[45] Stephen C. Fehr, *Road Kill on the Information Highway*, Washington Post, Sunday, Mar 21, 1999, at A1.

[46] *See* Raymond L. Sterling, *Indirect Costs of Utility Placement and Repair Beneath Streets*, University of Minnesota, Report No 94-20, Aug. 1994, p. 28; Ghassan Tarakji, PH.D, P.E., *The Effect of Utility Cuts on the Service Life of Pavements in San Francisco*, Volume I: Study Procedure and Findings, Final Report, May 1995, p. 19; IMS Infrastructure Management Services, Inc., *Estimated Pavement Cut Surcharge Fees For the City of Anaheim, California Arterial Highway and Local Streets*, Dec. 9, 1994, p. 2; City of Phoenix, *The Effects of Utility Cut Patching on Pavement Performance in Phoenix, Arizona*, Project 499, July 18, 1990, p. 5.; Andrew Bodocsi, Prahlad D. Pant, Ahmet E. Aktan, Rajagopal S. Arudi, Cincinnati Infrastructure Institute, Department of Civil & Environmental Engineering, University of Cincinnati, *Impact of Utility Cuts on Performance of Street Pavements*, Final Report, 1995, Exec. Summ. at 1.

[47] Fehr, *supra*

[48] Glasner, *High Bandwidth Bureaucracy*, Wired News, Mar 25, 1999. *See also* Ellen Perlman, *Taxing the Craters in the Street*, Governing, Feb. 1997.

rights-of-way require. Full recovery of the asset cost of rights-of-way for communities thus represents substantial amounts in addition to the superficial cost of administration alone.[49]

In effect, failure to recover these costs represents a subsidy to telecommunications companies by the community. Such a subsidy is something the community may choose to provide, perhaps as a means of stimulating business development. That choice, however, belongs purely to the community, not to federal agencies (particularly when the federal agencies have made policy decisions not to bear such costs).[50]

As the *Roadmap* report shows, federal land-owning agencies are concerned with receiving adequate compensation for rights-of-way across federal land. One of the task force's recommendations is:

> [T]hat all agencies recover their monitoring and compliance costs under the specific statutes governing their agencies and/or the broad authority granted them pursuant to the easement granting authority.... The Working Group recommends that agencies that have not adopted rules to execute their authority to recover monitoring fees follow the guidance provided in OMB Circular No. A-25. The circular directs agencies to recover the full costs of managing federal rights-of-way, including monitoring and other compliance activities.[51]

The *Roadmap* group also acknowledged the need for bonds as a means to address unforeseen expenses associated with an operator's use of the rights-of-way as well as the governmental agency's oversight and management of rights-of-way. As a means to protect the governmental interest, the *Roadmap* group advocated the use of bonds, a practice of local governments that has often been the subject of criticism. According to the *Roadmap* group:

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[49] *See* Governmental Accounting Standards Board Statement number 34. This recent addition will require local governments to capitalize and depreciate the costs of right-of-way construction.

[50] Federal land-owning agencies are also concerned about the problem of adequate compensation for rights-of-way across federal land. *See* "Fair Market Value Analysis for Fiber Optic Cable Permit in National Marine Sanctuaries," a report by the National Ocean's and Atmospheric Administration ("NOAA") as noticed for comment in 66 Fed. Reg. 43135 (Aug. 12, 2001), and studies cited therein.

[51] *Roadmap* at 40.

> If... a rights holder abdicates its responsibility to return the property to its previous condition, the Federal Government would then assume the task and the associated costs.
>
> ...Similarly, an agency could confront unanticipated costs if a grantee fails to restore government property to its previous condition following rights-of-way construction. Agencies may avoid even infrequent and, usually minimal, rights-of-way compliance expenditures, by requiring a bond or other means of securing performance.[52]

The work group enforced its call for bonding requirements by citing the case of NOAA, which had permitted the deployment of cables without a bond and which must now bear the expense of minority cables deployed in NOAA rights-of-way by a bankrupt entity:

> NOAA did not require performance bonds from two companies that had received permission to install fiber optic cable in two different national marine sanctuaries. Post-installation surveys and monitoring of one of the submarine cables revealed unburied cable in some places along its route. At other locations, portions of cable were suspended, in one instance up to several feet above the seabed. Exposed and inadequately buried cables can present a hazard to commercial fishermen who might snag their fishing gear, and to fish and marine mammals that might then become entangled. Both cable companies sought protection in bankruptcy or insolvency proceedings and were unable to pay for monitoring and other fees required by their permits. A qualified buyer has assumed responsibility for one of the cables and payments have resumed; however the other cable system (the one with exposed segments) remains the subject of a bankruptcy proceeding.[53]

Local governments again appear to be paralleling the conduct of federal right-of-way managers in seeking to recover up front all expenses plus a reasonable rental fee, and then to protect themselves and their constituents by requiring bonds or insurance to address any unforeseen expenses.

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[52] *Id* at 41

[53] *Id* at 41

IV. THE FCC MUST ENFORCE ITS RULES ON ALLEGATIONS OF WRONGDOING.

Local Government would also like to place industry commenters on notice that the Commission has established rules that any community that is the subject of an allegation of misconduct is to be served with a copy of such allegations. In 1998, the Commission revised its *ex parte* rules to require that petitioners serve a copy of any preemption petition on each state or local government cited in the petition.[54] The Commission has been asked to extend these requirements to Notices of Proposed Rulemakings and Notices of Inquiries as well.[55] The purpose of the Commission's requirements is to allow state and local governments a fair opportunity to respond to allegations made against them by interested parties before the Commission.

The practice of behind-the-back allegations converges with the practice (noted above) of repeated assaults in multiple proceedings, creating an environment in which local communities must maintain constant vigilance and repeatedly expend scarce resources to refute claims that otherwise would seem to gain credibility from their repetition alone. Failure to stem these practices will only give credence to the belief that the Commission's procedures give a crushing advantage to those industry entities that have the resources to participate constantly in the Commission's multiple dockets.

[54] *See* Suggested Guidelines for Petitions for Ruling Under § 253 of the Communications Act, 13 FCC Rcd. 22970 (1998).

[55] *See* FCC Local And State Government Advisory Committee, Advisory Recommendation Number 2, Notification to States and Localities Named in Commission Proceedings, adopted June 27, 1997, *available at* http://www.fcc.gov/statelocal/recommendation2.html.

V. THE RECORD IS REPLETE WITH EVIDENCE THAT RIGHT-OF-WAY MANAGEMENT HAS NOT HARMED TIMELY DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS SERVICES.

In paragraph 39 of the NOI, the FCC cites a NARUC study for the premise that the FCC should identify federal, state and local abusive practices. The FCC fails to note that the study did not gain the support of its sponsoring Committee, the Telecommunications Committee, let alone NARUC as a whole. The cover page of the study "Promoting Broadband Access Through Public Rights-of-Way and Public Lands" makes this clear to all readers and so too should the Commission:

> The Options listed within this report are the product of the Study Committee on Public Rights-of-Way and do not necessarily reflect the views of NARUC.[56]

Local Government believes that the study was not accepted by NARUC because it did not respect the balanced approach local governments take in managing rights-of-way. Local Government would call to the Commission's attention the Local Government View section of the Report, which may be found starting at page 183. This section was adopted by NARUC to the same extent as the sections cited by the Commission in the NOI.

VI. LOCAL GOVERNMENTS HAVE BEEN ACTIVE SUPPORTERS OF THE NTIA'S EFFORT, BUT ITS GREATEST DEFICIENCY HAS BEEN FAILURE TO CATALOGUE ILEC PREFERENTIAL TREATMENT IN STATE LEGISLATION.

The Commission at ¶ 39 of the NOI cites to NTIA's effort to catalogue state and local governments' right-of-way statutes and ordinances. Commenters were active participants in the NTIA proceedings. Local Government was disappointed, however, to note that NTIA has failed to catalogue the number of state statutes that provide preferential treatment to incumbent local

[56] NARUC Work Group, *Promoting Broadband Access Through Public Rights-of-Way and Public Lands* (July 31, 2002)at Title page

exchange carriers, a practice that has led to litigation and claims of prejudicial conduct by industry.

VII. THE COMMISSION WOULD DO WELL TO HEED THE GUIDANCE OFFERED BY THE LSGAC.

The Commission at ¶ 39 cites to the work of the Commission's Intergovernmental Advisory Committee, formerly known as the Local and State Government Advisory Committee (LSGAC). Local Government applauds the Commission for its recognition of the leadership of the LSGAC and encourages the FCC to heed the guidance found in the four LSGAC Resolutions addressing rights-of-way.

The importance assigned to the right-of-way issue by the LSGAC is reflected in the fact that this issue was the subject of its First Recommendation to the Commission:

> The Committee believes the FCC's action in creating the Committee is a major step toward developing a constructive dialogue between the FCC and the state and local governments. The FCC is currently considering many individual petitions by various telecommunications companies and trade associations to preempt state and local control of rights-of-way. The Committee expresses its commitment to work closely with the FCC Commissioners and staff as they review the various petitions. To begin that process, the Commission today adopts the following statement of principles that it recommends the Commission incorporate as petitions and issues develop before the FCC. [57]

The LSGAC proceeded to advise the Commission in its First Recommendation on rights-of-way:

> State and local governments are trustees of the public's rights-of-way. Rights-of-way are real estate property rights of substantial economic value and interest to local communities. The public has a right to fair compensation for occupancy and use of its property.
>
> ...

[57] LSGAC First Recommendation to the FCC (June, 1997) *available at* http://www.fcc.gov/statelocal/recommendation1.html.

State, local and FCC officials share the common goals of bringing true and effective competition in telecommunications services to all our citizens as quickly as possible while minimizing the adverse effects on other essential community needs, costs and interests.

The 1996 Telecommunications Act defined the balance between federal and state and local responsibilities in telecommunications. ... The [1996 Act] ...designates states and local governments as the primary entities responsible for rules and regulations related to telecommunications service providers' entry into, compensation for use of, and behavior in the public's rights-of-way.

...State and local governments bring unique expertise in the valuation and operation of multiple uses of the public's rights of way. The FCC and state and local governments should assume the mutual burden of educating the other parties in their respective areas of expertise. Regulation, preemption, and formal legal action against another level of government should be the last, not the first, recourse to resolve conflicting interests.

Rights-of-way disputes between telecommunications companies and local governments should be resolved in local jurisdictions. The FCC should avoid adopting broad policy statements or decisions that implicate other matters of state and local interests such as cable television network design without first having full and complete dialogue with the Committee.[58]

The guidance provided to the Commission by the LSGAC in 1997 is still good advice for the Commission today. Local Government would also recommend for the Commission's consideration three additional right-of-way recommendations the LSGAC provided the Commission. These recommendations addressed:

- Zoning controversies with respect to wireless towers;[59]
- The need for the Commission to defer to the expertise of state and local governments in addressing right-of-way controversies;[60] and
- The constitutional and statutory bans prohibiting the Commission from requiring access to the property of state and local governments in the form of mandatory building access rules.[61]

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[58] *Id*

[59] LSGAC Recommendation 28 -- Petition by Cingular Wireless to Preempt Zoning Regulations of Anne Arundel County, Maryland which Prohibit Commercial Wireless Service Providers from Interfering with Public Safety Communications (October 2002) *available at* http://www.fcc.gov/statelocal/rec28.pdf.

[60] LSGAC Recommendation 24 -- Recommending that the Commission defer to the expertise of national associations representing local governments in developing rights-of-way management guidelines or practices. Notice of Proposed Rulemaking, Notice of Inquiry, and Third Further Notice of Proposed Rulemaking, WT Docket No 99-217, CC Docket No. 96-98. (October 2000) *available at* http://www.fcc.gov/statelocal/rec24 pdf

VIII. THE TELECOMMUNICATIONS INDUSTRY'S POSITION ON RIGHTS-OF-WAY CONTRASTS SHARPLY WITH THE POLICIES OUTLINED ABOVE.

If the NARUC Study, referenced by the Commission in ¶ 39 of the NOI, provides any insights, they may lie in the paper's capture of the Telecommunications Industry Rights-of-Way Working (IROW) group's bottom line on promoting public right-of-way access (p.182). The IROW group demanded that the LSGAC and NARUC adopt a position that "Fees charged for public right-of-way access should reflect only the actual and direct costs incurred in managing the public rights-of-way...."[62] This statement stands in stark contrast to the legislative history of the Telecommunications Act and the practices of federal right-of-way managers outlined in NTIA's *Roadmap* of capturing all fees and a fair rental value for occupancy of federal rights-of-way.[63]

IX. PREEMPTION OF LOCAL GOVERNMENT RIGHT-OF-WAY FRANCHISE AUTHORITY HAS NOT INCREASED DEPLOYMENT OF ADVANCED SERVICES.

Texas is a paradigm of industry efforts to preempt local governments' right-of-way franchise authority. Texas is the third most populous state in America and was one of the first states since 1996 to restrict local governments' right-of-way franchise authority. The Texas experience since passage of HB 1777 objectively describes the consequences of preemption of

[61] LSGAC Recommendation 23 -- Regarding state and local governments rights-of-way regulations and compensation requirements. Notice of Proposed Rulemaking, Notice of Inquiry, and Third Further Notice of Proposed Rulemaking, WT Docket No. 99-217, CC Docket No. 96-98 (August 2000) *available at* http://www.fcc.gov/statelocal/rec2223.pdf

[62] NARUC paper, IROW statement at 182.

[63] *See Roadmap* at p. 36 *et seq*

local governments regulatory authority.[64] The Texas experience is proof positive that preemption of local authority does not result in accelerated deployment of advanced service.

In 2001, two years after passage of HB 1777, the Public Utilities Commission of Texas ("PUCT") reported that 16.5% of Texas communities had advanced service and 36.1% have high-speed service.[65] However 47.3%, almost half of all Texas communities, still did not have either high-speed or advanced services.[66] By contrast, the Commission reported that by December 2001, 75% of all U.S. zip codes had high-speed service.[67]

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[64] In 1999, the Texas Legislature enacted House Bill 1777 ("HB 1777"). The primary purpose of HB 1777 was to limit the compensation that Texas local governments could charge for use and occupation of the public rights-of-way, but HB 1777 also restricted local governments authority in other important ways. HB 1777 made voidable all existing franchise agreements. HB 1777 restricted the power of Texas local governments to require telecommunications providers to: obtain franchise agreements to occupy public rights-of-way; build-out entire communities or otherwise prevent "cherry-picking" by telecommunications providers; build facilities to or provide service to public schools, higher educational facilities, community centers, and government buildings as a condition of using and occupying the public rights-of-way; compensate local governments for the administrative costs of processing right-of-way permits and inspecting facility emplacement and construction within the public rights-of-way; and obtain local approval prior to transferring management and operation of communications facilities located within local rights-of-way. Tex. Local Govt Code §§ 283.052(a), 283.056(a), 283 056(c), and 283.056(f).

Texas municipalities did retain right-of-way management authority to require: permits; registration of right-of-way occupants; maps of facilities placed in the rights-of-way, insurance; performance guarantees; joint trenching; location of other facilities prior to commencing right-of-way construction; limitation hours of construction; compliance with noise abatement, dust and disposal of construction material regulations; management of traffic disruption; construction methods for street cuts and restoration; and standards for restoration of the public rights-of-way. However, municipalities may not recover compensation from providers for the costs of enforcing these protective regulations.

[65] *See* Public Utilities Commission of Texas, *Report to the 77th Texas Legislature Availability of Advances Services in Rural and High Cost Areas* (Jan. 2001) ("PUCT 2001 Adv. Serv. Rept."), *available at* http://www.puc.state.tx.us/telecomm/reports/index.cfm.

The FCC defines "advanced services" as high-speed broadband services, i.e., infrastructure capable of delivering 200 kilobits per second (Kbps) in one or both directions. Federal Communications Commission, Deployment of Advanced Services: Second Report and Order, CC Docket No. 98-146, 15 FCC Rcd. 20913 at ¶¶ 10-11 (2000) ("Second Advanced Services Report"). "High-speed" is defined as 200 Kbps in at least one direction; "advanced services infrastructure" is defined as capable of 200 Kbps in both directions. *Id*

[66] This information is based on survey responses collected between March and April 2000. 2001 PUCT Adv. Serv. Rept.

[67] It is difficult to compare the availability of advanced and high-speed service on a national level. The FCC collects data by zip code and does not report what percentage of zip codes or states have advanced service compared to high-speed or slower service. Zip code data collection creates unreliable statistics, since a zip code will be considered to have advanced service if only one business subscriber has a T-1 line, while all surrounding residents in the same zip code have only 28 Kbps dial-up modem service.

In Texas, local right-of-way franchise authority has been preempted. In Texas, communities still do not have access to advanced services. Missouri City, Texas, a fast growing community near Houston, Texas, cannot find a telecommunications company willing to provide high-speed or advanced service to the City or its residents.[68] Under HB 1777, Missouri City cannot impose or require many of the right-of-way management requirements that industry have asked to have preempted. Yet deployment of advanced services still has not reached Missouri City.

X. BROADBAND DEPLOYMENT IS DEPENDENT ON ACCESS TO CAPITAL FINANCING, NOT THE ABSENCE OF LOCAL REGULATION.

Industry has not suffered from right-of-way management requirements; its challenge has been the lack of access to capital financing. As Adelphia Business Solutions ("ABS") commented to the FCC: "While revenues were limited, and profits non-existent, CLECs were able to continue their forward progress because of the confidence placed in them by the financial markets, and the capital that such investment provider for facilitates construction. Now that bubble has burst."[69] ABS noted that CLEC capitalization reached its pinnacle in March 2000.[70] The declining deployment rate of advanced services has no correlation with local right-of-way management regulations and further attempts to restrict local right-of-way authority will not reverse the declining deployment rates.

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[68] *See* Reply Comments of TCCFUI in 3rd 706 NOI filed October 9, 2001.

[69] Section 706 NOI Comments of Adelphia Business Solution ("ABS § 706 Comments") filed September 24, 2001 at 6-7

[70] ABS § 706 Comments at 1.

The lack of capital and management weaknesses has resulted in numerous CLECs' filing for bankruptcy protection.[71] For local governments, this means that numerous bankrupt providers now have facilities located in the public rights-of-way, facilities whose location may or may not have been reported to state and local authorities, and facilities whose ownership and control is now uncertain. These bankrupt providers may have customers – which may include government and public schools – who may or may not be receiving service. Further limiting local right-of-way authority will not reverse these bankruptcies and it will not speed broadband deployment.

XI. SUMMARY.

Fair and reasonable compensation requirements, like right-of-way management, lie outside the FCC's sphere of "barriers to entry." The Commission's own spectrum auction policies and those of federal right-of-way managers outlined in NTIA's *Roadmap* are directly analogous: spectrum and federal rights-of-way, like state and local rights-of-way, are a scarce resource that is most efficiently allocated through a market price mechanism such as an auction or recovery of fair market value.

Local property cannot be given away by the federal government to telecommunications companies without just compensation. As NATOA and NLC have noted in other comments, such a giveaway would implicate Constitutional issues, including Fifth Amendment takings as well as the "anti-commandeering doctrine" of *New York v. United States*.[72] These constitutional

[71] *See* Martin. F. McDermott III, *CLEC: An Insider's Look at the Rise and Fall of Local Exchange Competition* (Penobscot Press 2002)

[72] 505 U.S. 144 (1992)

considerations, as well as § 253 itself, require that local communities be free to take appropriate measures, including revenue-based measures, to establish such compensation.

The federal courts, led by the Supreme Court in *City of St. Louis v. Western Union Tel.*,[73] and ratified by the Fifth Circuit in *City of Dallas v. FCC*,[74] recognize that local governments have the normal rights of all property owners in controlling all elements and benefits of right-of-way property. Thus, telecommunications providers placing their facilities in public rights-of-way must pay fair and reasonable compensation no less than the cable company hanging its cables in *Loretto v. TelePrompter Manhattan*[75] or providers placing their switching equipment in telephone central offices in *Bell Atlantic v FCC*.[76]

As compelling as the federal government's interest in encouraging competition in telecommunications may be, there is no basis in law or logic for requiring local governments to subsidize competitors by turning over a valuable asset without charging an economically efficient price. On the contrary, as noted above, thousands of miles of networks *have already been put in place* through market negotiations.

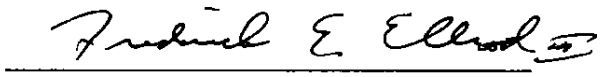
[73] *City of St Louis v Western Union Tel.*, 148 U.S. 92 (1893), *opinion on reh'g*, 149 U.S. 465 (1893).

[74] *City of Dallas v FCC*, 118 F.3d 393, 397 (5th Cir. 1997).

[75] *Loretto v TelePrompter Manhattan*, 458 U.S. 420 (1982).

[76] *Bell Atlantic v FCC*, 306 U.S. App. D.C. 333, 24 F.3d 1441 (1994).

Respectfully submitted,



Nicholas P. Miller
Gerard Lavery Lederer
Frederick E. Ellrod III
MILLER & VAN EATON, P.L.L.C.
Suite 1000
1155 Connecticut Avenue N.W.
Washington, D.C. 20036-4320
Telephone: (202) 785-0600
Fax: (202) 785-1234

Attorneys for United States Conference of Mayors, National Association of Counties, American Public Works Association, Texas Coalition of Cities for Utility Issues, Montgomery County, Maryland, and the Mount Hood Cable Regulatory Commission.

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